Supreme Court, U.S.
FILED
MAY 23 2003
OFFICE OF THE CLERK

No. 02-1186

In the Supreme Court of the United States

GUIDO A. PRONSOLINO AND BETTY J. PRONSOLINO, AS TRUSTEES FOR GUIDO A. PRONSOLINO AND BETTY J. PRONSOLINO TRUST; AMERICAN FARM BUREAU FEDERATION; CALIFORNIA FARM BUREAU FEDERATION; MENDOCINO COUNTY FARM BUREAU,

Petitioners,

v.

WAYNE NASTRI, REGIONAL ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY REGION 9; CHRISTIE WHITMAN, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

TIMOTHY S. BISHOP
SUSAN E. BRICE
Mayer, Brown, Rowe & Maw
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

JEFFREY W. SARLES
Counsel of Record
RUSSELL R. EGGERT
CRISTINA CARMODY TILLEY
Mayer, Brown, Rowe & Maw
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

Counsel for Petitioners
[Additional counsel listed on inside cover]

JOHN J. RADEMACHER
American Farm Bureau Federation
225 Touhy Avenue
Park Ridge, IL 60068
(847) 685-8600

NANCY N. MCDONOUGH
California Farm Bureau Federation
2300 River Plaza Drive
Sacramento, CA 95833
(916) 561-5500

TABLE OF CONTENTS

Page

REPLY BRIEF FOR PETITIONERS 1

TABLE OF AUTHORITIES

Page(s)

Cases

Chisom v. *Roemer*, 501 U.S. 380 (1991) 9

Dole Food Co. v. *Patrickson*, 123 S. Ct. 1655 (2003) 5

EPA v. *California*, 426 U.S. 200 (1976) 6

Solid Waste Agency v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) 9

Statutes

Clean Water Act, 33 U.S.C. § 1251 *et seq.*:
Section 208, 33 U.S.C. § 1288 6
Section 301(b), 33 U.S.C. § 1311(b) ..... *passim*
Section 303(d), 33 U.S.C. § 1313(d) ..... *passim*
Section 304(a), 33 U.S.C. § 1314(a) 7
Section 319(a), 33 U.S.C. § 1329(a)(2) 3, 5

Other Authorities

43 Fed. Reg. 60662 (1978) 7

50 Fed. Reg. 1774 (1985) 7

EPA, *Section 319 Success Stories Volume III: The Successful Implementation of the Clean Water Act's Section 319 Nonpoint Source Pollution Program* 9

Houck, THE CLEAN WATER ACT TMDL PROGRAM (1999) 8

REPLY BRIEF FOR PETITIONERS

EPA cannot point to any support in the language or legislative history of the Clean Water Act for its extraordinary extension of its authority to waters impaired only by nonpoint sources. It has no answer to the fact that for two decades it consistently interpreted the Act's TMDL program not to reach so far.

Instead, EPA principally contends that EPA-imposed TMDLs are not important enough for this Court to bother with. The government pretends that such TMDLs have no teeth but are mere "informational tools" that "do not impose legal obligations or prohibitions on polluters." U.S. Br. 2-4. EPA does not deny, however, that it legally obligated California to implement the rigorous load limits in EPA's Garcia River TMDL, that the land use controls made necessary by that TMDL have imposed millions of dollars in costs on petitioners and other landowners, or that the 40,000 TMDLs to be implemented over the next decade will cost the States over $1 billion at a time when state deficits are mounting rapidly. See Pet. 27. These are issues of critical importance to landowners, to State and Federal agencies, and to the Nation.

1. The government's portrayal of mandatory TMDLs as benign sources of information is refuted by EPA's own words. EPA's Garcia River TMDL, for example, describes the TMDL process as follows: "Upon establishment of the TMDL by EPA, the State is *required* to incorporate the TMDL, along with appropriate *implementation* measures, into the State Water Quality Management Plan." ER-1 at 6 (emphasis added). Further, the State must "develop and submit an *implementation plan* to EPA" containing "reasonable assurances that the nonpoint source load allocations established in the TMDL [will] in fact be achieved." *Id.* at 43 (emphasis added). These

implementation requirements, which the EPA sets forth in great detail and with precise deadlines in each of its TMDLs, are federal mandates that EPA continuously monitors and that severely restrict the flexibility of state and local governments to address agricultural and forestry run-off and other forms of nonpoint source pollution. See Brief of Respondents American Forest & Paper Association and California Forestry Association 3-4.

2. The government attempts to downplay EPA's unprecedented intrusion into the traditionally State and local domain of land use controls, suggesting (at 5) that TMDLs may be implemented only under "state law." In fact, TMDLs were a creation of the federal 1972 Act, and California law did not even provide for TMDLs when EPA imposed its Garcia River TMDL.

EPA also argues that it has "no authority" to enforce TMDL restrictions or require the States to do so, and that its role is limited to benevolently disbursing funds to "assist" the States. U.S. Br. 5. That portrayal is not supported by the record in this case. EPA's brief conveniently omits any reference to its threat of "nasty little tricks" unless California implemented EPA's Garcia River TMDL as EPA demanded. See ER-86 ¶¶ 21-22; Pet. 4, 24. That TMDL's requirement of a 60% sediment reduction was expressly based on "land management and/or restoration measures." ER-1 at 37. Forcing California to impose land use controls on the Pronsolinos and other landowners may be "assistance" in the government's vocabulary but constitutes coercion under any plausible standard. Such coercion cannot be reconciled with Congress's assignment to the States of primary responsibility over nonpoint source pollution and local land uses.

EPA's attempt to seize control over local land use activities extends far beyond the Garcia River basin. Imposing TMDLs on nonpoint sources of pollution inherently opens the door to widespread EPA control over local land uses because the "sources" of nonpoint source pollution are primarily agricultural and forestry activities. These are activities that Congress consistently has directed the States to address through best management practices and other voluntary mechanisms. See 33 U.S.C. § 1329(a)(1)(C).

It is no answer to say that States may choose how to implement these federal mandates. U.S. Br. 14-15. If the government were to mandate that the height of all buildings be reduced by 10 percent, any State discretion about how to implement that reduction would not make the mandate any less onerous. If a State must reduce sediment loadings to a specified level mandated by EPA, its range of options is exceedingly narrow. And the fact that EPA has been mandating implementation measures as well as allowable loads renders those purported options illusory.

According to the government (at 14-15), the Court need not be concerned about EPA's trampling of the federalist scheme embodied in the Clean Water Act because several States, including California, supported EPA's position below. But, as the government acknowledges (at 6), EPA imposed the Garcia River TMDL after California *refused* to place waters impaired only by nonpoint sources on its § 303(d)(1)(A) list. See ER-86 ¶¶ 3-5; Pet. 4. Moreover, the States have vehemently opposed EPA's efforts to expand TMDLs to reach waters impaired only by nonpoint sources. When EPA proposed its new TMDL regulations incorporating that position (see Pet. 28), objections were voiced by the Environmental Council of the States (of which 52 states

and territories are members), the Association of State and Interstate Water Pollution Control Administrators, and the Coastal States Organization. In comments submitted to EPA, these organizations denied "that USEPA has clear statutory authority for proposed nonpoint source requirements," explaining that "the requirement to include waterbodies solely impacted by nonpoint sources on the 303(d) list is a strained interpretation of Section 303(d)(1)(A)."[1] The fact that certain States, in the wake of the decisions below and in the face of EPA's "nasty little tricks with grants and such," have been forced to accede to EPA's demands does not make EPA's position and conduct any less coercive or this issue any less important.

3. EPA's imposition of these costly and burdensome TMDLs is based on a blatant misconstruction of the statutory text. Section 303(d)(1)(A) plainly excludes waters not subject to point source pollution from the mandatory TMDL program. See Pet. 8-11. EPA's assertion that § 303(d)(1) does not refer to "point sources" or contain any "limiting language" is mere bluster. U.S. Br. 11 n.1. Congress restricted the class of waters subject to mandatory TMDLs to waters subject to "effluent limitations," which by definition apply only to point sources. That limiting language cannot be excised from the statute by governmental fiat. The government's attempt to recast mandatory TMDLs as mere sources of information also disregards the critical distinction between the § 303(d)(1) list of waters subject to mandatory TMDLs and the § 303(d)(3) list of waters for which States are to "estimate" TMDLs "[f]or the specific purpose of

[1] http://www.sso.org/ecos/projects/cleanwater/tmdlcomments.htm.

developing information." 33 U.S.C. § 1313(d)(3). See Pet. 12.[2]

The government's "common-sense understanding" of § 303(d)(1)(A) makes no sense at all. U.S. Br. 10. EPA contends that each State must identify "all waters" within its boundaries and then "exclude those waters that will attain the applicable water quality standards through application of effluent limitations." *Ibid.* In other words, first identify "all waters," then prune that list to "all sub-standard waters," and forget about the waters actually specified in § 303(d)(1)(A). That is an impermissible re-write of the statute. Section 303(d)(1)(A) does not require the identification of "all waters" or "all sub-standard waters" within a State's boundaries. Instead, Congress directed the States to identify a sub-class of sub-standard waters—those "for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) are not stringent enough" to implement applicable water quality standards. The government closes its eyes when it comes to the "effluent limitations" restriction.

Statutes are not to be construed in a "strained" manner. *Dole Food Co.* v. *Patrickson*, 123 S. Ct. 1655, 1661 (2003). Why would Congress even attempt to define the class of sub-standard waters if the mandatory TMDL list was to include *all* sub-standard waters? Why would Congress define the waters to be listed by reference to particular effluent limitations if it meant to include waters not subject to effluent limitations at all? The government

---

[2] If Congress viewed TMDLs as the "informational tools" described by the government, it presumably would have included § 303(d)(1) among the Clean Water Act provisions specifically listed in § 319(a)(2) as useful sources of information for the States' development of water quality assessment reports. See 33 U.S.C. § 1329(a)(2).

cannot and has not even attempted to answer these fundamental questions.

EPA finds it irrational that waters polluted by a single point source would be treated differently from waters polluted only by nonpoint sources. U.S. Br. 11. But what EPA calls irrational is actually Congress's federalist division of labor in the fight against water pollution. The 1972 Congress reasonably mandated TMDLs for point source impaired waters for which specified technological controls are insufficient to achieve water quality standards, while allocating control over nonpoint source impaired waters to the States through § 208 regional waste treatment management plans. Far from being irrational, limiting the authority of the federal government in such fashion was a plausible policy choice and consistent with the States' traditional authority over local land uses and with constitutional standards. See Pet. 24.[3]

4. EPA's current position is of recent vintage. For decades after enactment, EPA construed § 303(d)(1) to apply only to waters impaired by point sources. See Pet. 17-18. Although the government asserts that EPA's current

---

[3] Whether § 303(d)(1) applies to blended waters—those impaired by both point source and nonpoint source pollution—is not at issue in this case. Thus, there is no need for what could only be an advisory opinion on that issue here. Petitioners suggest, however, that once the inapplicability of § 303(d)(1) to waters impaired only by nonpoint sources is confirmed, the treatment of blended waters will be plain. Section 303(d)(1)(A) requires identification of all waters impaired by point source pollution, which would include blended waters, but TMDLs for such waters may appropriately allocate maximum loads only to point sources. See *EPA* v. *California*, 426 U.S. 200, 205 n.12 (1976) (water quality standards serve to supplement effluent limitations by further regulating point sources).

construction of § 303(d)(1) is longstanding, it points to no statement by EPA (or anyone else) prior to the 1990s that § 303(d)(1) applies to waters impaired solely by nonpoint sources. Instead, the government simply repeats the unsupported assertion of the court below that EPA's initial regulations implementing the 1972 Act "quite clearly" required States to list "waters polluted only by nonpoint sources." U.S. Br. 12.

The court below, however, pointed to no such "clear" statement. It cited (without quotation) a published EPA Notice from 1978 (Pet. App. 17a), but that Notice did not address whether § 303(d)(1) applies to waters impaired only by nonpoint sources. Its stated and sole purpose was "to finalize EPA's *identification of pollutants* suitable for total maximum daily load calculations," as required by section 304(a)(2) of the 1972 Act. 43 Fed. Reg. 60662, 60662 (1978) (emphasis added). The Notice stressed that "the proposed identification of pollutants is not intended to require States to devote additional resources to TMDL and wasteload allocation development." *Ibid.* The Notice said nothing at all about whether waters impaired only by nonpoint sources were subject to mandatory loads.

Furthermore, the government simply disregards statement after statement by EPA after enactment that refute its current position, such as EPA's 1985 statement that "[w]e think it is clear from the Act that TMDLs are appropriate wherever effluent limitations are necessary to meet water quality standards." 50 Fed. Reg. 1774, 1778 (1985). That statement cannot be reconciled with EPA's current view that TMDLs are appropriate for waters to which effluent limitations do not apply at all. The government also disregards the fact that EPA's 1987 guide to the States' role in fighting nonpoint source pollution did not even mention TMDLs or § 303(d). See Pet. 17. It also

has no explanation for EPA's 1997 memorandum acknowledging that, as of that late date, it had "not yet address[ed] implementation of TMDLs for waters impaired only by nonpoint sources." ER-91 Ex. 7, at 5. That 1997 memorandum represented "the first time" EPA applied section 303(d)(1) "to exclusively nonpoint waters." Houck, THE CLEAN WATER ACT TMDL PROGRAM 61-62 (1999). These contemporaneous statements and omissions provide a far better indication of the meaning of § 303(d)(1) than EPA's current litigation posture.[4]

In similar fashion, the government dismisses without addressing consistent references to "point sources" in the relevant legislative history of § 303(d). See U.S. Br. 12 n.2; Pet. 14. In contrast to the abundant statements that Congress intended TMDLs to aid in imposing more stringent effluent limitations on these point sources (see Pet. 14), EPA offers no suggestion from anyone in Congress that TMDLs were intended to apply to waters impaired only by nonpoint sources.

The critical point here is less what is in the legislative and administrative history than what is not. For decades after enactment, there was *not a single mention* of employing TMDLs for waters impaired solely by nonpoint sources in the numerous Congressional hearings and debates on the Clean Water Act, in EPA's extensive regulations and publications, or in academic commentary.

---

[4] In a March 28, 2003 letter to the Oregon Department of Environmental Quality, EPA admitted that its current construction of § 303(d)(1) was developed only in the 1990s, stating: "For more than a decade, EPA's position has consistently been that nonpoint source impaired waters are covered by the TMDL program." EPA would not have temporally limited its position to one decade if it had held a similar view in the 1970s or 1980s.

See Pet. 21 n.5. If there were any such mention, the government or one of the respondents would have quoted it. Like "the dog that did not bark" (*Chisom* v. *Roemer*, 501 U.S. 380, 396 n.23 (1991)), this silence is deafening.

5. The construction of § 303(d)(1) adopted by EPA and the court below is so at odds with the text of that provision that it can be explained only by a desire to achieve a particular policy result rather than give effect to the intent of Congress. EPA's construction reflects a desire to assert federal control over all aspects of the fight against water pollution, even those that Congress plainly reserved for the States. Rather than rein in EPA's foray into local land use regulation, the court below first accorded deference to EPA and only then turned to the text of the statute to attempt to justify its deference. See Pet. 7-8. Although the government denies that the court below put the deference cart before the statutory horse, it acknowledges that the Ninth Circuit addressed the deference issue "at the outset" of its opinion and only then turned to the statutory language. U.S. Br. 9. The petition should be granted to ensure that § 303(d)(1) is construed and implemented based on the statutory text rather than on EPA's policy predilections. See *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 172-173 (2001).

No one is proposing that nonpoint source pollution is insignificant or need not be addressed. In sections 208 and 319, Congress chose specific means to address nonpoint source pollution that are sensitive to State primacy in this area. EPA and the States have demonstrated their ability to control nonpoint source pollution and improve water quality by partnering on State-led programs without imposing TMDLs on nonpoint source impaired waters. See EPA, *Section 319 Success Stories Volume III: The*

Successful Implementation of the Clean Water Act's Section 319 Nonpoint Source Pollution Program.[5] EPA's attempt to expand mandatory TMDLs into waters impaired only by nonpoint sources is not only unauthorized but unnecessary.

Respectfully submitted.

TIMOTHY S. BISHOP
SUSAN E. BRICE
Mayer, Brown, Rowe & Maw
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

JOHN J. RADEMACHER
American Farm Bureau Federation
225 Touhy Avenue
Park Ridge, IL 60068
(847) 685-8600

JEFFREY W. SARLES
Counsel of Record
RUSSELL R. EGGERT
CRISTINA CARMODY TILLEY
Mayer, Brown, Rowe & Maw
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

NANCY N. MCDONOUGH
California Farm Bureau Federation
2300 River Plaza Drive
Sacramento, CA 95833
(916) 561-5500

MAY 2003

---

[5] http://www.epa.gov/owow/nps/Section319III.